IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-1110

WILLIAM JOHN BEER, Judge Oakland County Circuit Court, As a Candidate and Citizen,

Petitioner,

vs

SECRETARY OF STATE OF THE STATE OF MICHIGAN and THE CLERK OF THE COUNTY OF OAKLAND,

Respondents.

On Petition For a Writ of Certiorari To The Supreme Court of The State of Michigan

BRIEF FOR RESPONDENT SECRETARY OF STATE OF THE STATE OF MICHIGAN IN OPPOSITION

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Varda N. Fink
Assistant Attorney General
State Affairs Division

Attorneys for Respondent
Secretary of State for the
State of Michigan

Business Address:
760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1979

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OPINIONS BELOW

The opinions of the courts below are reproduced in the Appendix to the Petition. In addition, the order of the Michigan Supreme Court is reported at *Friedman* v *Secretary of State* and *Friedman* v *Beer*, 403 Mich 825 (1978).

JURISDICTION

Respondent Secretary of State denies that this Court has jurisdiction to review the judgment by *appeal* under 28 USC § 1257(2) because this case does not draw into question the *validity* of the state statute but merely challenges the construction given to the statute by the Michigan Supreme Court. Because that construction is dependent upon state law, the

judgment is based upon an adequate and independent non-federal ground. Furthermore, Petitioner has failed to follow the proper procedure to obtain review by appeal in this Court, see Supreme Court Rules 13(2), 15.

Respondent does not deny that this Court has certiorari jurisdiction under 28 USC § 1257(3), and that this Court may regard the papers as a petition for a writ of certiorari, 28 USC § 2103.

QUESTION PRESENTED

Does the interpretation of Michigan law by the Michigan Supreme Court denying to a state circuit court judge the right to run as an incumbent for election to a separate, newly-created judgeship in the same circuit deprive the judge of Equal Protection of the Laws under the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves § 4 of 1978 PA 164 (amending, *inter alia*, MCLA 600.501, *et seq;* MSA 27A.501, *et seq*) which provides in relevant part:

> ". . . An elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by this amendatory act may become a candidate in the primary election for that office for any term for which a judge is to be elected at the 1978 general election in that circuit by filing an affidavit of candidacy with the secretary of state not later than 4 days after the effective date of this amendatory act."

This case also involves Article VI, § 19 of the Michigan Constitution of 1963 which provides:

> "The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state. No person shall be elected or appointed to a judicial office after reaching the age of 70 years."

STATEMENT OF THE CASE

Petitioner in this action is an incumbent Michigan circuit court judge whose term of office expires January, 1981. 1978 PA 164 amended, *inter alia*, the statutes organizing state circuit courts, MCLA 600.501, *et seq;* MSA 27A.501, *et seq*, and created new judicial positions in the Sixth Judicial Circuit of the state. In the implementation portion of 1978 PA 164, Section 4 provides that "an elected incumbent circuit judge" could seek election as an incumbent to a newly-created position by filing an affidavit of candidacy. Petitioner filed an affidavit of candidacy for the August, 1978, primary election in the manner set forth in § 4.

Thereafter, on June 9, 1978, Michael S. Friedman, a candidate for a new judicial position in the Sixth Judicial Circuit of the State of Michigan filed an action for mandamus in the Michigan Court of Appeals. In that action he challenged the constitutionality of 1978 PA 164, § 4 and sought an order directing the Secretary of State of the State of Michigan to delete the name of William John Beer from the August, 1978, primary election ballot. Friedman's challenge to the constitutionality of the statutory provision was based upon the belief that § 4 enabled an elected incumbent circuit judge whose term was not expiring to seek election to a newly-created judicial position within the same circuit. The de-

fendants in the action filed by Friedman were Richard H. Austin, Secretary of State for the State of Michigan, and William John Beer, the Petitioner before this court.

At the same time that Friedman filed his complaint for mandamus with the Michigan Court of Appeals he also filed an action for declaratory judgment and injunctive relief in the Circuit Court for the County of Oakland, Michigan.

On June 28, 1978, the Michigan Court of Appeals issued an order denying Friedman's complaint for mandamus "for lack of merit in the grounds presented" (Petitioner's Appendix 6a).

On July 14, 1978, the Oakland County Circuit Court in the separate action filed by Michael S. Friedman issued an opinion which held that Petitioner William John Beer was entitled to participate in the primary election as a candidate for one of the newly-created judicial positions. Petitioner's Appendix 2a-5a. The Oakland County Circuit Court case was consolidated in the Supreme Court with the Court of Appeals case.

On July 31, 1978, the Michigan Supreme Court ordered the Secretary of State to delete the name of William John Beer from the list of candidates certified for the August 8, 1978, Sixth Judicial Circuit primary election. The court construed 1978 PA 164, § 4, so as to permit only those incumbent judges whose terms would expire on January 1, 1979, to seek election to the newly-created judicial positions. Petitioner's Appendix 7a-8a.

ARGUMENT

THE INTERPRETATION OF MICHIGAN LAW BY THE MICHIGAN SUPREME COURT DENYING TO A STATE CIRCUIT JUDGE THE RIGHT TO RUN AS AN INCUMBENT FOR ELECTION TO A SEPARATE NEWLY-CREATED JUDGESHIP IN THE SAME CIRCUIT DOES NOT DEPRIVE THE JUDGE OF EQUAL PROTECTION OF THE LAWS UNDER THE UNITED STATES CONSTITUTION.

A. The Challenge to the Michigan Supreme Court's Interpretation of Michigan Election Law Does Not Present Any Substantial Federal Question.

Assuming that the Petitioner is seeking review by certiorari (28 USC § 1257(3)) rather than appeal (28 USC § 1257(2)), he must assert a violation of a right claimed under the Constitution of the United States. It is apparent from the phrasing of the first question presented in the petition that he asserts such a violation (denial of Equal Protection of the Laws) only by the *interpretation* of the statute and does not challenge the statute itself since he argues that the plain words of the act are sufficient to demonstrate its validity. In order to run as an incumbent for a newly-created judgeship Petitioner, a state circuit court judge, sought to file for candidacy under § 4 of 1978 PA 164, an implementation provision of a statute changing the number of state circuit judges. Persons qualifying to file for candidacy as incumbents for the new position could do so by merely filing an affidavit; others had to obtain voter signatures on nominating petitions.

The Michigan Supreme Court concluded that Petitioner "is not qualified to file for candidacy as an incumbent" within the meaning of the statute. Appendix to the petition, 7a. In reaching this conclusion the court determined that the statute

in the same circuit at the same time. There is nothing in the Michigan election law which would compel Petitioner or any other incumbent circuit judge to resign from the position with the shorter term. Furthermore, even if such a judge were to resign from the position with the shorter term upon election to the new position, the state would have then been faced with the necessity of filling a new vacancy.

Certiorari is granted only when a federal question of substance is presented for review, *Rice* v *Sioux City Memorial Park Cemetery*, 349 US 70 (1955) and the insubstantiality of any federal question in this case is apparent when it is recalled that the construction of the statute is the responsibility of the Michigan Supreme Court, not a federal court. *Standard Oil Company* v *Johnson*, 316 US 481, 483; 62 S Ct 1168; 86 L Ed 611 (1942). In *Beck* v *Washington*, 369 US 541, 554-555; 8 L Ed 2d 98; 82 S Ct 935 (1962), this Court stated:

> ". . . We have said time and again that the fourteenth amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial errors . . .' [Citation omitted] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question. . . ."

In the context of state statutes pertaining to qualification for election to public office, the burden of demonstrating an Equal Protection violation is a severe one, as shown by this Court's decision in *Snowden* v *Hughes*, 321 US 1, 8 (1943):

> "But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a

divided elected incumbent circuit judges into two categories. The first category consisted of judges whose terms of office expired January 1, 1979. The second category, which included Petitioner, encompassed judges whose terms of office expired after January 1, 1979, the commencement date of the newly-created judgeship. Under 1978 PA 164, § 4, as construed, the judges in the first category were qualified to run as incumbent candidates for the new judgeships in the same circuit. The judges in the second category, including Petitioner, were not qualified to run as incumbent candidates for the new judgeships.

Although this interpretation of the statute might be said to create a classification since only certain persons could qualify to file for candidacy as an incumbent, Respondent submits that the classification is reasonable and is based upon important and legitimate public policy considerations. The state is entitled to create a classification if there is a rational basis for the classification, *Kotch* v *Board of River Port Pilot Commissioners*, 330 US 552; 67 S Ct 910; 91 L Ed 1093 (1947).

The Michigan Supreme Court construed 1978 PA 164, § 4, in a fashion which prevented circuit court judges occupying non-expiring terms from hopping from one judicial position to another within the same circuit. This construction of the statute makes a rational distinction between categories of circuit court judges and does not deny judges in the second category equal protection of the law. The judges in the first category, if elected, would not have served overlapping terms because their previous terms expired January 1, 1979, the identical day on which the new terms commenced. On the other hand, judges in the second category, such as Petitioner, occupy terms which did not expire on January 1, 1979. As a result if Petitioner or any other judge in the second category could have sought and won election to a new circuit judgeship, such individual would have occupied two judicial positions

denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. . . . But a discriminatory purpose is not presumed . . . there must be a showing of 'clear and intentional discrimination,' . . . ." (citations omitted).

B. Petitioner's Challenge to a Section of the Michigan Constitution Was Not Raised in the State Courts and is Therefore Not Properly Before This Court.

In his second argument Petitioner appears to challenge Mich Const 1963, Art VI, § 19 which prohibits the appointment or election of a person to judicial office after reaching the age of 70 years. Petitioner is currently 69 years of age and his present term of office expires in January 1981, at which time he will be over 70. In the petition he seems to suggest that the Michigan Supreme Court interpreted 1978 PA 164 § 4 as it did in order to prevent him from remaining on the bench after attaining 70 years of age but such a suggestion has no basis in fact. Petitioner's age had no bearing

on the court's construction of the statute because that construction merely prevented judges occupying non-expiring terms, regardless of age, from seeking election as incumbents to newly-created judgeships in the same circuit.

Furthermore, the constitutionality of Article VI, § 19 of the Michigan Constitution and its effect on Petitioner's claim was never raised in the proceedings before the state courts. This Court has held on numerous occasions that in order to give the Supreme Court of the United States jurisdiction to review a final judgment of the highest court of a state, a claim of federal right must be asserted in some fashion before the state court, e.g. *Socialist Labor Party* v *Gilligan*, 406 US 583 (1972), *Hartford Life Insurance Company* v *Johnson*, 249 US 490 (1919). Although Petitioner may wish at a later date to challenge the constitutionality of Article VI, § 19 of the Michigan Constitution which will have the effect of preventing him from seeking reelection when his current term of office expires, the question as presently framed is premature. The existence of a real federal question is essential to the jurisdiction of the Supreme Court of the United States to review judgments of state courts, e.g. *Caldwell* v *Texas*, 137 US 692 (1891), *Equitable Life Assurance Society* v *Brown*, 187 US 308 (1902).

As indicated by the unique facts of this case it is apparent that the issue raised by Petitioner—the validity of a construction of a state statute pertaining to a ballot designation as an incumbent—will affect few, if any, persons other than Petitioner. The minimal importance of this case is further emphasized by the fact that the election in which Petitioner sought to file for candidacy as an incumbent has already taken place and because of this possible mootness it is difficult to see what relief might be available to him under the circumstances.

CONCLUSION

For the foregoing reasons, it is requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Varda N. Fink
Assistant Attorney General
State Affairs Division

Attorneys for Respondent
Secretary of State of the
State of Michigan

Business Address:
760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Dated: February 5, 1979